United States Circuit Court of Appeals,

EIGHTH CIRCUIT.

OCTOBER TERM, A. D. 1940.

SOUTHERN RAILWAY COMPANY, a Corporation,
Appellant,
vs.
CLARENCE A. STEWART, Administrator of the Estate of John R. Stewart, Deceased,
Appellee.

No. 11,609.

Appeal from the District Court of the United States for the Eastern District of Missouri.

APPELLANT'S MOTION FOR A REHEARING.

Comes now the Southern Railway Company, a corporation, the appellant in the above-entitled cause, and respectfully moves this Court to set aside its opinion and judgment in the above-entitled cause herein rendered on November 1, 1940, and to grant appellant a rehearing of this cause, and for grounds of this motion respectfully states that questions decisive of this cause and duly submitted by appellant were inadvertently overlooked by this Court, and

that the decision of this Court is in conflict with the controlling decisions of the United States Supreme Court, and that this Court has erred in its opinion and judgment, as appellant respectfully submits, in the respects following:

I.

In its brief and argument on the hearing appellant urged that the trial court erred in denying appellant's motion for a directed verdict and in denying appellant's motion for judgment non obstante veredicto, because (a) the record contains no evidence that the deceased attempted to open the coupler knuckles by using the pin lifter, an appliance provided to operate the automatic coupler, and (b) because the record contains no evidence that an inefficient coupler was the proximate cause of decedent's injury. We respectfully urge that this Court erred in overruling appellant's contentions as above set forth.

In its opinion this Court say:

> "The only parts of the record that could bear upon the condition of the pin lifter is the testimony of the witness Stogner, especially that found on pages 29, 31, 34, 36 and 40 of the transcript. The Supreme Court has held that the statute must be liberally construed so as to give a right of recovery for every injury, the proximate cause of which was failure to comply with the Act. The jury may not be permitted to speculate as to the cause of the injury, and 'the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer.' Atchison, Topeka and Santa Fe Railway Co. v. Toops, 281 U. S. 351, 354, 355. We are asked to declare that, on the record before us, the motions of appellant for a directed verdict and for a verdict in its favor non obstante veredicto should have been sustained; but in view of the record we can-

not say that the inference might not reasonably have been drawn by the triers of the fact that there was probable cause to believe that the injury suffered was caused by the breach of duty charged."

In quoting from Looney v. Metropolitan Railroad Co., 200 U. S. 480, 487, 488, the Court say:

"A plaintiff in the first instance must show negligence on the part of the defendant. • • • But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

We respectfully submit that this Court erred in holding from the record that the triers of the fact might reasonably draw an inference that there was probable cause to believe that the injury suffered was caused by a breach of the duty charged.

Witness Martin, the engineer, saw Stewart immediately before and at the time Stewart went between the cars. On direct examination by appellee he said that he looked out all the time for signals, but he did not notice Stewart use the pin lifter before he went in there (between the cars). He was watching for a signal all the time (R. 46). Before Stewart went between the cars he saw Stewart give him a signal. There was no obstruction between Stewart and the engineer when Stewart gave him the stop signal and went between the cars (R. 47). The condition of the visibility was pretty clear (R. 48). Stewart signaled by hand and the engineer could see his hand (R. 49).

In this opinion the Court say, in substance, that appellee's case depends wholly on an inference. This inference is and necessarily must be an inference that Stewart attempted by means of pin lifter to open the knuckle and it

would not open the knuckle. This inference, we think, becomes dissipated in the face of the positive evidence that Martin was watching for a signal and did not notice Stewart use the pin lifter before he went between the cars. The rule of law is here applicable that when evidence comes in the door inferences fly out the window. How may the jury be permitted to say that he did use the pin lifter in the face of the evidence that a man in position to see and looking at him and watching for a signal did not notice him use the pin lifter?

In this opinion the Court has ruled that appellee's case depends upon an inference. It is the enunciated rule of the United States Supreme Court that even though an inference arises from plaintiff's evidence that, uncontradicted, invests him with a prima facie case, yet, where his prima facie case depends upon an inference, it becomes dissipated upon the advent of uncontradicted, unimpeached evidence showing affirmatively to the contrary, even though the uncontradicted and unimpeached evidence is introduced by defendant.

Penn. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819;
So. Ry. Co. v. Walters, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239.

Again, where the evidence is so overwhelming as to leave no room for doubt what the fact is, the trial court should direct a verdict. The evidence is overwhelming that Stewart did not use or attempt to use the pin lifter. The sole and only evidence in that regard was introduced by plaintiff; and that evidence, in our opinion, conclusively demonstrates, by the man who was looking directly at him and watching for a signal, that Stewart did not use or attempt to use the pin lifter.

Penn. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819;

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720;
Patton v. T. & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361;
Small v. Lamborn & Co., 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597;
N. & W. R. Co. v. Hall, 49 Fed. (2d) 692.

Insubstantial and insufficient testimony does not require the submission of an issue to the jury.

So. Ry. Co. v. Walters, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239;
A. T. & S. F. R. Co. v. Toops, 281 U. S. 351, 50 S. Ct. 281, 74 L. Ed. 896.

Where there are several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which he alone would be entitled to recover. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof.

Penn. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819;
Gulf etc. R. Co. v. Wells, 275 U. S. 455, 48 S. Ct. 151, 72 L. Ed. 370;
N. Y. C. R. Co. v. Ambrose, 280 U. S. 486, 50 S. Ct. 198, 74 L. Ed. 562;
Stevens v. The White City, 285 U. S. 195, 52 S. Ct. 347, 76 L. Ed. 699.

Now just what would the jury be justified in believing, under the evidence, that Stewart did to justify a verdict in favor of appellee? Would the jury be justified in finding that Stewart used or attempted to use the pin lifter to open the knuckle to couple the cars by impact? The jury would have to so find before they could find for appellee

and how could they be permitted to so find in the face of evidence that he did not use or attempt to use the pin lifter. Even if we admit that an inference arises from the evidence favorable to appellee, yet if that is true, undoubtedly several inferences arise from the facts of equal force at least with the inference favorable to appellee, and we think of greater force. If there is an inference that arises that he did use the pin lifter, under the evidence that inference is weak; and from the engineer's testimony a stronger inference arises, we think conclusive, that he did not use the pin lifter, the appliance provided to permit the couplers to couple automatically by impact without the necessity of men going between the ends of the cars. If he did not use or attempt to use the pin lifter, then the coupler safety appliance could not have been the proximate cause of his injury.

Did or did not Stewart use or attempt to use the pin lifter? Even though we could say an inference arose, weak in character as it would be, yet with the evidence of the engineer in the record that he did not notice Stewart use the pin lifter, such evidence would permit the jury to speculate wildly to be permitted to find that Stewart used or attempted to use the pin lifter. The United States Supreme Court has never recognized the scintilla rule. However, we do not think the evidence herein even justifies the application of the scintilla rule.

This Court holds that a plaintiff in the first instance must show negligence on the part of the defendant, but that the negligence of a defendant cannot be inferred from a presumption of care on the part of a plaintiff. If defendant's negligence cannot be inferred from the presumption of care on plaintiff's part, then in this case, we submit, no inference of negligence arises, especially since the engineer, who was observing Stewart, did not see Stewart use or attempt to use the pin lifter before going between

the cars, for the United States Supreme Court says that, under such circumstances, negligence must be shown by direct evidence.

In its opinion this Court says, quoting from Looney v. Metropolitan R. Co., 200 U. S. 480, 487, 488, that "One presumption cannot be built upon another." Of course, as has been held many times, this also refers to inferences. Consequently, for appellee herein to recover, the trier of the facts would have to infer that Stewart used or attempted to use the pin lifter to open the knuckle and then base on that inference the further inference that the knuckle would not open so as to permit the cars to couple.

We respectfully submit that this Court erred in failing to sustain appellant's contention as submitted and overlooked by this Court.

II.

In its brief and argument, for a second point, appellant urged that the trial court erred in denying appellant's motion for a directed verdict and in denying appellant's motion for judgment non obstante veredicto because of the action of the trial court in disregarding, and, in effect, setting aside the action of the Probate Court, in allowing the compromise settlement referred to, and in refusing to set the same aside.

We again refer to our argument in our brief on this subject and again submit it to the consideration of the Court.

It is a well-recognized principle that the federal courts recognize and enforce the orders, judgments and decrees of the probate courts of a state.

Williams v. Benedict, 8 How. 11, 112;
Veach v. Rice, 131 U. S. 293, 314;
Christianson v. King County, 239 U. S. 356, 372, 373;
O'Connor v. Stanley, 54 Fed. (2d) 20, 24, 26.

We think that as the Federal Employers' Liability Act statute expressly gave to the administrator the right of action and as the administrator must receive his appointment from a state probate court, the statute contemplates that the orderly procedure of the Probate Court should be followed. While it is true that the recovery is for the benefit of the beneficiary or beneficiaries designated by the statute, yet the Probate Court does have jurisdiction and administers the estate pro tanto and that jurisdiction is plenary. We agree that the action is governed exclusively by the federal law, but we submit that the federal law gave jurisdiction to the State Probate Court and that such jurisdiction within its scope is as plenary as the jurisdiction given a state circuit court to try a Federal Employers' Liability Act case and enter a valid, binding and collectable judgment. Thus as a probate court's approval of a settlement in an ordinary case is binding until legally set aside, so it follows, we think, that a probate court's order of settlement in a Federal Employers' Liability Act case is within its jurisdiction and binding until set aside. Furthermore the Probate Court had jurisdiction of the subject matter and of the parties, and its judgment is final, conclusive and binding until set aside on appeal. The administratrix herself invoked the jurisdiction of the Probate Court, and is estopped to deny that jurisdiction. It is immaterial whether the judgment of the Probate Court is erroneous. It is binding until set aside and cannot be contested here. The remedy, if any, was by appeal. We respectfully submit that in its opinion this Court erred in that regard.

III.

The third point urged by appellant in its brief and argument, is that the trial court erred in denying appellant's motion for a directed verdict because neither fraud nor

duress may be predicated on the facts and circumstances in evidence.

We again call this Court's attention to our brief heretofore filed in this court in this cause.

In its opinion in this case this Court said:

> "The testimony that the acts of the attorneys and claim agent of the appellant constituted a threat to deprive the son-in-law of Mrs. Stewart of his job with the Terminal Association was not strongly in support of the charge of fraud and duress."

This Court says that the testimony was not strongly in support of the charge of fraud and duress. The testimony of appellant was overwhelming that no fraud or duress obtained. A judgment permitted to stand on such testimony would shock the conscience. It is a rule of law enunciated by the United States Supreme Court that where the evidence is so overwhelming on one side as to leave no room for doubt what the fact is, the trial court should sustain a motion for a directed verdict. The testimony of appellee and his witnesses is vague, inconclusive and uncertain. That of appellant is strong, cogent, clear and convincing that no fraud or duress obtained. This is a case in which this Court on that subject may very properly apply the rule of overwhelming evidence as shown by the cases following:

Penn. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 291, 77 L. Ed. 819;
Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720;
Patton v. T. & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361;
Small v. Lamborn & Co., 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597;
N. & W. R. Co. v. Hall, 49 Fed. (2d) 692.

We again respectfully ask the Court to reconsider the questions above raised. We ask the Court to reconsider said questions because we sincerely feel aggrieved with the rulings of the Court on the motion for a directed verdict.

We further ask, if this petition is granted, that the judgment of the District Court be reversed, with directions to sustain appellant's motion for judgment non obstante veredicto and directing the District Court to enter judgment thereon in favor of appellant, in bar of appellee's action, and for costs.

WILDER LUCAS,
ARNOT L. SHEPPARD,
WALTER N. DAVIS,
Attorneys for Appellant.

We, the undersigned, counsel of record for Southern Railway Company, the petitioner in the above and foregoing petition for rehearing, do hereby certify that the above and foregoing petition for rehearing is filed in good faith and is believed by us, and each of us, to be meritorious; and that same is not filed for the purpose of vexation or delay.

Wilder Lucas,
Arnot L. Sheppard,
Walter N. Davis.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 15, 1940.